No. 92-515

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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This amicus curiae brief is submitted in support of respondent, Todd Mitchell. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The Center for Individual Rights ("CIR") is a non-profit public interest law firm founded in 1989. Through its litigation activities, CIR seeks to advance respect for individual rights. Many of CIR's cases have involved the First Amendment. *E.g.*, *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992). CIR believes that in recent years, governmental entities and courts have circumscribed fundamental First Amendment freedoms in the pursuit of objectives such as social justice, fairness, or sensitivity. This case is another example of such limitations on First Amendment freedoms.

SUMMARY OF ARGUMENT

1. Todd Mitchell committed a brutal, calculated assault on an innocent young boy. No one should doubt that the "First Amendment does not protect [such] violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Under traditional sentencing practices, Mitchell would be punished severely for this crime. That is not the issue here. The issue is whether Wisconsin may also punish Todd Mitchell because of his beliefs. Those beliefs were crude, ugly and unformed. But that does not change matters. Wisconsin punished Mitchell because the contents of his beliefs about race were abhorrent to it. Most Americans share that abhorrence. But the First Amendment does not. It subjects governmental efforts to punish individual beliefs because of their content to the most exacting scrutiny.

2. The Wisconsin statute undeniably imposes punishment because of a defendant's beliefs. Beyond that, the statute's history, language, structure and effect demonstrate that it is content-based: it was directed at a narrow category of beliefs, about controversial public issues, which the State abhors.

3. Because it is content-based, the Wisconsin "hate crime" statute is subject to the most exacting scrutiny. It does not survive. The State cannot claim an interest either in punishing defendants for the content of their beliefs about public issues, nor in punishing a category of conduct defined entirely by the content of the actor's beliefs. The State also cannot justify the statute on the grounds that "discrimination crimes" are a proxy for offenses that involve severe criminal conduct, lack of remorse, future dangerousness, and injury to the victim. If the State wishes to impose harsher penalties for these things, it could do so much more accurately and fairly.

4. The federal civil rights laws confirm the Wisconsin statute's fatal content-based infirmity. None of

the civil rights laws were directed at imposing content-based punishment on individual beliefs. Striking down the Wisconsin statute will not jeopardize federal civil rights protections.

I. CONTENT-BASED REGULATIONS OF INDIVIDUAL BELIEFS ABOUT PUBLIC ISSUES ARE SUBJECT TO EXACTING SCRUTINY

Central to the First Amendment is the rule that "[c]ontent-based regulations are presumptively invalid." *R.A.V.*, 112 S. Ct. at 2542. This general prohibition against content-based regulation of expression and belief is fundamental to American democracy:

> If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating . . .' To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.[1]

No other approach to content-based regulations "'would comport with the premise of individual dignity and choice upon which our political system rests.'"[2]

Thus, this Court has long required the most exacting scrutiny for content-based regulation of protected speech and expressive conduct. Under this standard, the State must demonstrate that a content-based regulation is the least restrictive means of accomplishing a compelling governmental objective.[3]

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[1] *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-38 (1980) (citations omitted).

[2] *Leathers v. Medlock*, 111 S. Ct. 1438, 1444-45 (1991) (quoting *Cohen v. California*, 403 U.S. 14, 24 (1971)).

[3] *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *First Nat'l Bank*

The First Amendment's general prohibition against content-based regulations is not limited to fully-protected speech. The First Amendment also requires exacting scrutiny for content-based regulations of *unprotected* speech and conduct that could be entirely prohibited; for example, the State generally may not enact a content-based prohibition against obscenity or fighting words that discredit government policies, while tolerating other types of obscenity or fighting words.[4] Likewise, even though reasonable time, place and manner limits would permit regulation of a particular category of conduct, content-based restrictions on *some* of that conduct are presumptively invalid; for example, while a State may forbid all picketing, its content-based discrimination between different types of picketing must satisfy the most rigorous scrutiny.[5]

Content-based efforts to regulate individual beliefs are also subject to the most exacting First Amendment scrutiny.[6] "[A]t the heart of the First Amendment is the

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v. Bellotti, 435 U.S. 765, 786 (1978); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Texas v. Johnson*, 491 U.S. 397, 415-17 (1989); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Smith v. Goguen*, 415 U.S. 566, 575-76 (1974).

[4] *R.A.V.*, 112 S. Ct. at 2543. *See also Schacht v. United States*, 398 U.S. 58, 63 (1970).

[5] *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455 (1980).

[6] The First Amendment would require the most exacting scrutiny if a State imposed criminal liability on individuals because they held certain beliefs. *American Communications Ass'n v. Douds*, 339 U.S. 382, 408 (1950) ("one may not be imprisoned or executed because he holds particular beliefs"). The First Amendment would require similar scrutiny of less direct efforts to regulate individual belief. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1947) ("Congress may not

notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[7] Governmental efforts to regulate the content of individual beliefs require no less rigorous scrutiny than content-based regulations of fighting words, obscenity, flag-burning or nude dancing. Indeed, although the selective prohibition of unprotected speech "does not pose [the] threat" that the "Government may effectively drive certain ideas" from the marketplace, *R.A.V.*, 112 S. Ct. at 2545 (quotation omitted), the selective punishment of *beliefs* does raise precisely this specter. Beliefs demand protection as a means of safeguarding First Amendment liberties of speech and association—which could be subverted through controls on individual thoughts.

II. THE WISCONSIN STATUTE IS SUBJECT TO EXACTING SCRUTINY BECAUSE IT IMPOSES PUNISHMENT ON INDIVIDUAL BELIEFS

A. The Wisconsin Hate Crime Statute Inquires Into and Imposes Criminal Sanctions Because of Individual Beliefs

The Wisconsin hate crime statute plainly imposes governmental sanctions on individuals because of their

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'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.'"); *Rutan v. Republican Party*, 497 U.S. 62 (1990). In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943), this Court rejected the argument that the State had an interest in coercing popular adherence to notions of "national unity": "Authority here is to be controlled by public opinion, not public opinion by authority." *See Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

[7] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). *See American Communications Ass'n*, 339 U.S. at 442 ("[t]he priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism and we have no claim to it.").

beliefs and motivations. As originally enacted, the statute provided for sentence enhancement if the defendant "intentionally select[ed] the [victim] because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person." Wis. Stat. § 939.645(1)(b) (1988). More recently, the statute was amended to make clear that sentence enhancement must occur when the defendant selected a victim "because of the actor's beliefs or perceptions" regarding the victim's status. Wis. Stat. § 939.645(1)(b) (1992). On its face, therefore, the statute specifically requires an inquiry into the defendant's beliefs—what the State itself terms the defendant's "victim selection process." If that inquiry reveals proscribed motivations or intentions, then the defendant faces substantially enhanced punishment. It is *only* because of, and *specifically* because of, the defendant's "prejudices" that the Wisconsin statute calls for enhanced punishment.[8]

This is confirmed by the statute's practical implementation. In determining whether the defendant has "[i]ntentionally select[ed]" the victim "because of the actor's beliefs" regarding the victim's protected status, the trial court will inevitably inquire into the defendant's beliefs and opinions when committing the crime. Inquiry will also be made into the defendant's associations and friendships, the books and movies he or she has read, watched or rented, and statements he or she has made to others.[9]

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[8] According to the Wisconsin Supreme Court, the Wisconsin law "is directed solely at the subjective motivation of the actor—his or her prejudice." *State v. Mitchell*, 169 Wis.2d 153, 485 N.W.2d 807, 814 (1992).

[9] A good example is *State v. Ayers*, No. 65276 (Md. Cir. Ct. Feb. 5, 1993), which involved a prosecution under Maryland's "hate crimes" statute. Defendant, a white man, was accused of attacking two black women. Defendant admitted to assaulting the women, but he denied having any racial bias, claiming "I am not a racist." Veronica T. Jennings, *Calling Racial Attack "Savagery," Judge Gives Man 60 Years*, WASH. POST, Feb. 6, 1993, at B1, B4. As support for this position, defendant offered four black friends and a psychologist, who opined that Ayers was not a bigot. *Id.*

A similar inquiry occurred in *State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E. 2d 450, *petition for cert. filed*, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992). Defendant was indicted for violating Ohio's hate crimes statute, Ohio Rev. Code Ann. § 2927.12 (1987). The defendant testified that he had "associated" with black friends and neighbors, prompting the colloquy set forth in Appendix A.

The Wisconsin statute therefore plainly requires inquiry into, and imposes punishment because of, "the actor's beliefs." Nonetheless, it is suggested that "[n]o First Amendment rights are implicated by [the] statute because it is aimed at discriminatory conduct not speech." Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae, at 2, 4-10. That argument is simply not plausible.

The Wisconsin statute is expressly aimed at "*beliefs and perceptions*," not conduct or speech. It is beyond debate that the First Amendment would be applicable to a penalty enhancement statute that was triggered, for example, whenever the defendant committed an offense "with the intention of promoting independence for Puerto Rico" or "in order to obstruct statehood for the District of Columbia." It is also clear that the First Amendment would extend to a penalty enhancement statute that applied whenever the defendant "intentionally selected the victim because of" the victim's "support for government economic policies," "opposition to the Vietnam war," or "involvement in protests concerning abortion." Like each of the foregoing hypothetical statutes, the Wisconsin statute requires certain conduct to have occurred in order for it to be applicable, but the statute will impose punishment only

if (and precisely *because*) that conduct is accompanied by a defined set of beliefs.[10]

B. The History, Language and Structure of the Wisconsin Statute Demonstrate That it is a Content-Based Regulation of Individual Beliefs

The Wisconsin "hate crime" statute does not merely impose punishment because of individual beliefs and motivations. Rather, under well-established standards for determining content-neutrality, the statute deliberately targets a narrow set of abhorrent beliefs in a content-based manner. This Court recently explained that:

> [t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is the controlling consideration.[11]

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[10] The United States argues that "while the Constitution protects the right to harbor and express bigoted ideas, it does not confer the right to commit crimes based on those beliefs." Brief for the United States as Amicus Curiae, at 8. This misses the point. Mitchell claims no right "to commit crimes based on [bigoted] beliefs." He will be punished for such crimes. What he claims instead is that the Constitution does not permit him *also* to be punished because of—only because of and specifically because of—the content of his beliefs.

[11] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Or, "statutes [are] content neutral where they [are] *intended to serve purposes unrelated to the content of the regulated speech*, despite their incidental effects on some speakers but not others." *Simon & Schuster*, 112 S. Ct. at 511 n.** (emphasis added). Of course, it is not necessary to establish that the Wisconsin "legislature intends to suppress certain ideas," *id.* at 509, although we show below that this was in fact the case. Rather, a regulation is content-based if it is designed to "discriminate on the basis of the content" of the message or belief. *Regan v. Time, Inc.*, 468 U.S. at 648-49.

Simply put, content-based regulations are laws that are "directed at" the content or message of particular ideas, speech or conduct. *Texas v. Johnson*, 491 U.S. at 406.

It is clear that the Wisconsin statute is directed at a narrow set of social and political beliefs, about controversial public issues,[12] because of the State's abhorrence of those beliefs. Indeed, the law is but one of nearly 50 similar statutes that have been enacted or proposed around the country during the past decade's wave of concern about bias. For example, a federal "Hate Crimes Sentencing Enhancement" bill specifically targets acts "motivated by hatred, bias, or prejudice" against race, religion and other protected statuses. H.R. 4797, 102d Cong., 2d Sess. (1992). The sponsor of the bill explained: "It is time for the nation to open its eyes and face the truth about the resurgence of bias and hate. . . . It should not go unpunished. The bigots should be put on notice that the rest of us may be tolerant, but we won't tolerate them *or* their actions."[13]

The history, language, and effects of the Wisconsin statute demonstrate that it targeted the same biases. The title of the "hate crime" statute is not coincidental. That name reflects the fact that the law targets crimes where the offender acted because of his or her antagonism towards

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[12] Racial and ethnic differences and animosities have long been among the most sensitive, but important, issues in American public life. It is beliefs and expression concerning such "public issues" that the First Amendment most zealously safeguards. *NAACP v. Claiborne Hardware*, 458 U.S. at 913. Here, the State has singled out, from the entire range of motivations, intentions and beliefs connected with any unlawful conduct, a narrow category of individual thoughts concerning particular social and political issues. It is *that* State-defined category that is content-based and subject to strict scrutiny.

[13] *Bias Crimes: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 2 (1992) (statement of Rep. Schumer) (emphasis added).

persons with a particular status. The "intentional selection" of a victim of violent crime "because of" his race or other protected status will virtually always be inspired by one or several closely-related beliefs—racial resentment or antagonism, bias, or notions of racial separatism or superiority. As the Wisconsin Supreme Court found, the statute is directed squarely at these beliefs: it "commendably is designed to punish—and thereby deter—racism and other objectionable biases."[14]

The statute's legislative history confirms this. The law originated with a Drafting Request by Representative Clarenbach, the bill's sponsor. That request sought a bill to "increase penalties for violence *motivated by bigotry*

[14] *Mitchell*, 485 N.W.2d at 814. The State and several amici urge that the Wisconsin statute does not punish *only* those motivated by status-based bigotry and antagonism. *E.g.*, Brief of Petitioner at 37 (Mitchell "might have been motivated by a desire to appear tough and rebellious to impress his peers"); Brief for American Civil Liberties Union, at 12; Brief for the Lawyers Committee for Civil Rights Under Law, at 15 ("a mugger who attacks only Jews might do so because he thinks that they have more money than others"). As authoritatively interpreted by the Wisconsin Supreme Court, however, the sentence enhancement statute would not apply to these hypotheticals: they are not "hate crimes," nor are they motivated by "racism and other objectionable biases." 485 N.W.2d at 814. The Wisconsin Supreme Court's interpretation of the Wisconsin statute is, of course, binding. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

But even if the statute were *not* so interpreted, the creative hypotheticals suggested by amici do not change the fundamental point that the Wisconsin statute was specifically and deliberately directed at bigotry. The fact that the law also happens incidentally to fall, at its outer reaches, on some beliefs which are not readily characterized as pure bigotry cannot be permitted to conceal its true purpose and overwhelming effect. If this *were* capable of rendering the law content-neutral, States could always escape First Amendment scrutiny simply by drafting legislation that would spill marginally into areas not directly necessary to targeting particular beliefs.

(against protected classes under state law . . . .")[15] Moreover, the statute was later amended to make clear that it was directed at particular status-based biases. As described above, in 1992 the Wisconsin legislature made the law applicable where the defendant intentionally selects his victim "because of the *actor's beliefs or perceptions regarding the*" protected status of the victim. Wis. Stat. § 939.645(1)(b) (1992) (emphasis added). Like other hate crime legislation, the Wisconsin statute was plainly directed at beliefs whose content the legislature abhors.[16]

Most important of all, the unusual structure of the "hate crime" statute, together with the State's untenable justification for the law, make it clear that the statute is content-based.[17] These features of the statute demonstrate

[15] *See* Drafting Request from Rep. Clarenbach (Nov. 12, 1987) [hereinafter "Drafting Request"] (included in drafting record for Wisconsin Act 348, Wisconsin Legislative Reference Bureau).

[16] Lower courts considering similar legislation in other states have concluded that particular "hate crime" statutes are intended to punish class-based bias. *E.g.*, *State v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984); *People v. Grupe*, 532 N.Y.S.2d 815 (Crim. Ct. 1988); *Kinser v. State*, 88 Md. App. 17, 591 A.2d 894 (1991).

[17] The Wisconsin statute goes beyond content-discrimination to impose viewpoint-based punishments. Criminal defendants who are motivated by status-based bias receive enhanced punishment. Defendants who commit precisely the same offense, but who are motivated by a crusade *against* bigotry, receive no such punishment. *See* Drafting Request. Thus, while Todd Mitchell faces an enhanced punishment, no additional sentence would be imposed upon someone who murdered Mitchell, not because he was black, but in order to free Wisconsin of bigoted crime. Or, if violence erupted at a demonstration between advocates and opponents of gay rights, only the thugs with proscribed biases would face enhanced sentences. And again, racist intimidation by black separatists or members of the Ku Klux Klan would be punished more heavily than equally aggressive (but non-racist) behavior by those demanding racial harmony. The First Amendment does not permit such discrimination. Recalling *R.A.V.*, the First Amendment does not permit the State to favor those who

that it had to have been directed at punishing abhorrent beliefs; that is the clear, direct effect of the law and it is the only plausible explanation for the statute's structure.

According to the State, "[t]he Wisconsin legislature has determined that discrimination crimes are likely to involve aggravating circumstances warranting higher penalties." Brief of Petitioner at 9. In particular, hate crimes are said to serve as proxies for "more severe offense[s]," "more severe offender[s]," "depravity," "retaliatory crime or copycat crime," "repeat criminal behavior," "lack of remorse," and "public injury." *Id.* at 19-27.

But if these were Wisconsin's objectives, then it would have pursued those goals directly, without adopting the "hate crime" proxy. If Wisconsin wished to punish lack of remorse, repeat offenders, or publicly disturbing crimes, it plainly would not punish Todd Mitchell *because of* his "status-based bias"; it would instead punish him *because of* his lack of remorse, his many other crimes, and his having brutally terrorized an innocent youth and an entire community. But instead of doing this, Wisconsin adopted a flat, across-the-board punishment enhancer that applies—entirely without regard to individual content-neutral circumstances—whenever a proscribed belief is present. That action is simply not consistent with any effort to punish crimes because they are severe, disruptive or likely to recur. But it *is* entirely consistent with an effort to punish bigotry and biased beliefs.

Beyond this, the Wisconsin statute only applies to an *ad hoc* coalition of *some* protected "statuses," which bear little relation to the purportedly content-neutral objectives

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commit violence "*in favor* of racial, color, etc. tolerance and equality" over those motivated by intolerance and bias. 112 S. Ct. at 2548 (emphasis in original).

of the law. Thus, the law singles out only a few types of status—race, religion, and sexual preference—for protection. The law excludes *other* types of status that are *identical* from the perspective of the State's asserted content-neutral justifications for the statute—including gender, age, economic class, membership in political or labor groups, and the like. Why is a brutal rape neither heinous nor likely to shatter the victim's life? Why is a calculated attack on impoverished farmers, because of their status, not likely to terrorize others similarly situated? Why is the shooting of a rival gang member or union rival not likely to provoke retaliation? Why is kidnapping and abusing an elderly person or young child not depraved?

Moreover, the "hate crime" law punishes proscribed beliefs without regard to the underlying crime. By its terms, the law applies to virtually *all* offenses in the Wisconsin Criminal Code, including: mooring watercraft to railroad tracks and fixtures, Wis. Stat. § 941.04; theft of trade secrets, Wis. Stat. § 943.205; presenting false or fraudulent insurance or employee benefit claims, Wis. Stat. § 943.395; and dognapping or catnapping, Wis. Stat. § 948.03.[18] The State's decision to punish bigoted beliefs in *all* cases, without regard to the character or severity of the crime, graphically illustrates that it is *not* "severe" or heinous crimes that the legislature seeks to punish; rather, it is bigotry—wherever it may appear.

Finally, the extremely loose causal nexus that must be satisfied in order to permit enhanced punishment for proscribed beliefs magnifies the impact of the Wisconsin statute on proscribed beliefs. As recently amended, the statute now expressly provides for enhanced punishment whenever the defendant acted "in whole *or in part*" because of his opinions regarding the victim's protected

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[18] A list of some of the criminal offenses to which the Wisconsin sentence enhancement statute applies is attached as Appendix B.

status.[19] As a consequence, punishment enhancement will be imposed on an extremely broad category of defendants, including bigoted thugs whose bigotry had virtually nothing to do with their crimes.[20] This deliberate effort to punish bias in as wide a range of circumstances as possible—even when doing so does not meaningfully advance the State's asserted content-neutral objectives—confirms that the law was directed at those beliefs.

It is true that a legislature may "conclud[e] that some states of mind accompanying the commission of a crime are deserving of special condemnation through enhanced punishment."[21] But the issue is *what categories* of "states of mind" and beliefs a State may subject to "special condemnation." We do not doubt that a State may punish Mitchell's violent intentions[22] nor that it could adopt a punishment enhancer for crimes committed with

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[19] Wis. Stat. § 939.645(1)(b) (1992). This codification merely reflects the Wisconsin Supreme Court's understanding of the unamended statute; even the dissent below interpreted the legislation as applying whenever racial animus played a "substantial part" in the defendant's motivation. *See Mitchell*, 485 N.W.2d at 827 (Bablitch, J., dissenting).

[20] For example, a man who hates Irish Catholics and who gets into a traffic altercation with a priest will be covered by the statute even if the altercation would have occurred with anybody else. Likewise, individuals whose personal or business quarrels lead to violence will face enhanced punishment if even a small "part" of their motivation could be shown to be bias towards a protected status.

[21] Brief of the United States as Amicus Curiae, at 13. *See* Brief of Petitioner at 19.

[22] The State suggests that extending First Amendment scrutiny to the Wisconsin statute would be inconsistent with the inquiry into "intent" required in many criminal contexts. Brief of Petitioner at 14. That is without basis. An inquiry into the defendant's intention to cause a particular act is content-neutral, applicable to the entire range of criminal law and criminal conduct. This time-honored feature of Anglo-American law raises no meaningful First Amendment question.

premeditation, with a firearm, by a repeat offender, or for financial reward. None of these enhancement statutes would even arguably be content-based legislation directed at a particular set of unpopular beliefs about social and political issues. But when a State adopts an enhancement statute that imposes punishment based upon the content of particular beliefs—applying, for example, to all crimes motivated by Communist beliefs or by a desire to protect abortion rights, gay rights or property rights—the First Amendment then properly demands the most exacting scrutiny.

The Wisconsin statute is no different. Rather than punishing defendants for their lack of remorse, their cruelty or their multiple offenses, the Wisconsin statute punishes them for having had particular *proscribed beliefs*; rather than punishing *all* (or many) of the motivations that aggravate criminal offenses, the statute only punishes *certain* unpopular beliefs; rather than enhancing punishment *only* for crimes that are serious or socially harmful, the statute automatically punishes proscribed beliefs in connection with *all* crimes, without regard to the underlying offense; rather than enhancing punishment when the proscribed belief was closely linked to the underlying offense, the statute punishes proscribed beliefs *wherever they exist*, even when they have only a trivial causal relation to the criminal conduct. Given all this, it simply cannot be denied that the Wisconsin statute is directed at the content of proscribed beliefs. That is what the statute says on its face; it is what the law achieves in practice; it is what the statute's sponsors said they intended to accomplish; and it is the only rational explanation for the law's peculiar structure.[23]

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[23] The "hate crime" law was *not* aimed at the "secondary effects" of the status-based biases that it singles out for punishment. *Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). First, the content of an idea, even more than the "emotive impact of speech on its audience is

III. THE WISCONSIN STATUTE DOES NOT SURVIVE HEIGHTENED SCRUTINY

Under the First Amendment, content-based regulations are generally subject to the most exacting scrutiny. As we show below, the Wisconsin statute does not survive heightened First Amendment scrutiny.

A. Wisconsin May Not Claim An Interest in Punishing Certain Bigoted Beliefs

Wisconsin may not, of course, claim any interest in punishing certain beliefs because of their content—be they racial antagonism, religious bias, dislike for heterosexuals or homosexuals, or notions of ethnic superiority. These beliefs are crude, ugly and repugnant. They run contrary to progressive America's deepest aspirations. But, above all else, the First Amendment forbids governmental efforts to dictate the content of individual belief. "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[24]

The First Amendment protects the right of individuals to express messages and hold beliefs that are wholly contrary to prevailing American ideals. Americans are free to burn their flag, to subscribe totalitarian or anarchic doctrine, and to reject democracy and equality. Todd Mitchell's crude racist beliefs are no different. "The First

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not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988). And, in any event, for all the reasons set out in text, the "hate crime" law simply was not aimed at "secondary effects"—like punishing remorselessness, repeat offenders, severe crimes, etc. The language, structure, history and effect of the law are to punish a proscribed set of beliefs, not objective effects of crime.

[24] *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (overruled by *Girouard v. United States*, 328 U.S. 1 (1946)).

Amendment does not guarantee that . . . concepts virtually sacred to our Nation as a whole—such as the principle that discrimination based on race is odious and destructive—will go unquestioned." *Texas v. Johnson*, 491 U.S. at 418.

Nor may Wisconsin avoid this result merely by asserting an interest in punishing a category of conduct that is *defined solely by the proscribed content of beliefs* held by the actor. Thus, the State claims an interest in enhancing punishment for a "subset [of criminal conduct that] is made up of criminal conduct that occurs because of the discriminatory motive of the actor." Brief of Petitioner at 8. This merely redefines the State's disagreement with particular ideas as disagreement with conduct *because of its motivating ideas*.[25] Although the State may have legitimate content-neutral reasons for preventing a class of conduct defined solely by the beliefs motivating that conduct, it must articulate and defend those reasons—not merely restate its ideological preferences. As this Court has observed elsewhere, the State "has taken the *effect* of the statute and posited that effect as the State's interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute." *Simon & Schuster*, 112 S. Ct. at 510 (emphasis in original).

B. Wisconsin's Asserted Content-Neutral Objectives Are Not Meaningfully Advanced By The Hate Crime Statute

The State offers a variety of content-neutral objectives that it asserts will be furthered by the Wisconsin statute. In particular, the State urges that "discrimination crimes" are a useful proxy for offenses that involve severe crimes, future dangerousness, retaliatory actions, copycat crimes,

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[25] *See, e.g.*, Brief of Petitioner at 22-23 ("Criminal acts take on a heinous quality simply because they are motivated by a desire to discriminate").

lack of remorse, and injury to the victim and society.[26] Punishing offenses with these features is a compelling end. However, "[i]t is not the State's ends, but its means, to which we object." *Texas v. Johnson*, 491 U.S. at 418. Here, it simply cannot credibly be maintained that the proxy selected by Wisconsin is either narrowly tailored or reasonably necessary to achieving these ends.

First, traditional criminal sentencing mechanisms provide a tested means of achieving the State's asserted content-neutral objectives which is both more effective and fairer than Wisconsin's proxy. Sentencing has long involved wide-ranging inquiries into the offender's character and offense: the sentencing authority "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider."[27] Moreover, traditional sentencing mechanisms (and modern sentencing guidelines) allow criminal punishments to be tailored to the individual defendant and his or her offense. *Williams v. New York*, 337 U.S. at 248-49 & n.10; *Lockett v. Ohio*, 438 U.S. 586, 602-05

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[26] Brief of Petitioner at 9-10, 19-27. The State also asserts that "[i]f a particular type of crime begins to occur more frequently, that fact alone warrants increased penalties to achieve a greater deterrent effect." *Id.* at 9. That is plainly wrong. A State could not enhance punishments for increasingly prevalent crimes by civil rights protesters, Democrats or Muslims, or for crimes where the actor's intention was to frustrate a particular governmental policy or further an ideology. The State's assertion amounts to the untenable claim that the Constitution imposes no limits on its power to categorize "particular type[s] of crime," even where that categorization is designed to suppress particular beliefs because of official disagreement.

[27] *United States v. Tucker*, 404 U.S. 443, 446 (1972). *See Williams v. New York*, 337 U.S. 241, 246-48 (1949); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); *Payne v. Tennessee*, 111 S. Ct. 2597, 2606 (1991). The sentencing process is accurately described as an "omnivorous" process. *See* Arthur W. Campbell, LAW OF SENTENCING § 10:1 at 307 (2d ed. 1991).

(1978). Thus, the State has a ready, workable mechanism to directly consider and punish—based upon the actual facts of particular cases—each of the content-neutral interests purportedly served by the Wisconsin law.[28] That is a much superior way of achieving these goals than Wisconsin's rough proxy.[29]

If the State wishes to impose harsher sentences for remorseless defendants or repeat offenders, it can do so directly, by asking whether Mitchell was remorseless and whether he has a criminal record. Or if the State wishes to punish brutal and depraved crimes, it can do so more accurately by looking at the brutality of Mitchell's individual offense. Under this approach, the savage, calculated beating of a helpless teenager by Mitchell and a dozen men—who had never laid eyes on their victim before and who had no cause for anger or animosity—would receive the most severe punishment. The terror that such attacks inflict on all citizens, and the devastating effect of Mitchell's crime on Gregory Riddick, would demand the strongest deterrence. Punishment for each of these aspects of Mitchell's crime is already available under our criminal justice system, without resorting to the manifestly inaccurate proxy of an arbitrary set of "status-based biases." What the traditional sentencing process does *not*

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[28] In considering whether to enhance a penalty, federal and state courts look to a broad range of considerations, including effects on the crime victim, the vulnerability of the victim, threat to public safety, whether the defendant has shown remorse, defendant's dangerousness, defendant's tendency to recidivism, presence of coercion, abuse of office or trust, the brutality of the crime, and the threat to national security. *See generally* Campbell, LAW OF SENTENCING at 306-07.

[29] Traditional sentencing mechanisms also provide a fairer means of determining criminal punishments. Inquiry can be made into relevant issues on the record with an opportunity for rebuttal. Defendants are not faced with the extraordinary stereotype, *see* Brief of Petitioner at 24-25, that they are repeat offenders, remorseless, or likely to commit future crimes because of their social and political beliefs.

do, however, is impose special punishments "because of" the content of the defendant's "beliefs." For this, Wisconsin required the hate crime statute. And it is precisely this that the First Amendment does not permit.

C. *Dawson v. Delaware* Demonstrates That the Wisconsin Statute is Unconstitutional

There is no merit to claims that the constitutionality of the Wisconsin law is supported by *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). On the contrary, *Dawson* demonstrates why the statute is unconstitutional.

Although the sentencing process has historically required wide-ranging factual inquiries, it has never involved sweeping content-based efforts to punish particular beliefs. Thus, both traditional sentencing decisions and the contemporary guidelines look to content-neutral factors such as lack of remorse, repeat offender status, effects on the community, and the like.[30] They do not consider the content of a defendant's social and political beliefs, not even as only one of many relevant sentencing factors. Indeed, as *Dawson* illustrates, the First Amendment does not permit any such content-based scrutiny of particular beliefs, much less the sweeping punishment imposed by the Wisconsin statute.

Dawson held that the First Amendment forbade the admission into evidence at sentencing of the defendant's membership in a prison gang known for its unlawful activities and racist ideology. Chief Justice Rehnquist declared that the evidence "proved nothing more than Dawson's abstract beliefs," 112 S. Ct. at 1098, and that the First Amendment barred use of evidence simply to

[30] *See United States v. Kikumura*, 918 F.2d 1084, 1098 (3d Cir. 1990); U.S. Sentencing Commission, FEDERAL SENTENCING GUIDELINES MANUAL 239 *et. seq.* (1993 ed.).

show that the defendant's views are "morally reprehensible." *Id.*

Dawson went on to suggest that the defendant's membership in a racist gang might have been admissible if it had been more directly relevant to a content-neutral aggravating circumstance. "In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." *Id.* Justice Thomas's dissent put things even more clearly. He emphasized that the Court does not "sit in judgment of the morality of particular creeds," but nonetheless would have admitted evidence of the defendant's gang membership. That, however, was *only* because he concluded that, under traditionally relaxed rules of relevancy and proof in sentencing inquiries, Dawson's membership suggested that he had engaged in "forbidden activities while in prison," *id.* at 1101, was a likely candidate for "future dangerousness," *id.*, and had a "violent" and "vicious" character.

The First Amendment limitations that the Court unanimously recognized in *Dawson* illustrate why the Wisconsin statute is unconstitutional. *Dawson* involved the admissibility of the defendant's gang membership, which in turn suggested that the defendant held several reprehensible beliefs. The disputed evidence was only one small part of a large body of facts and legal argument, on many subjects, that was presented at sentencing to the decisionmaker. Permitting such a wide range of evidence served important time-honored goals of the criminal justice system, including assuring that the defendant can present mitigating evidence.[31] But even this very indirect burden upon the defendant's various beliefs in *Dawson* was held unconstitutional save where defendant's membership could

[31] *See Williams v. New York*, 337 U.S. at 249; *Lockett v. Ohio*, 438 U.S. at 604-605.

be directly linked to content-neutral aggravating circumstances.[32]

It necessarily follows from *Dawson* that Wisconsin's flat, across-the-board sentence enhancement for all crimes motivated even in part by status-based bias is unconstitutional. The Wisconsin law does not merely sanction admission of one piece of evidence, bearing indirectly on several of the defendant's ideas. It singles out one particular political and social belief itself, and then, *based solely upon the content of that belief*, automatically and substantially increases punishment. By focusing specifically on the defendant's belief, and by then imposing punishment enhancement entirely because of the proscribed *content* of that belief, the Wisconsin law strikes directly into the heart of the First Amendment's protections in a way that the proceedings in *Dawson* did not even remotely approach—but which the rationale of *Dawson* clearly does not permit.

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[32] Similarly, in *Barclay v. Florida* this Court held that the Constitution does not prohibit taking racial motive into account, *when that racial motive is relevant to statutory aggravating factors*. 463 U.S. 939, 949 (1983). In *Barclay*, the defendant was a member of the Black Liberation Army, "'whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.'" *Id.* at 942. The trial court considered this motive "in the course of finding the 'great risk of death to many persons,' 'disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws,' and 'especially heinous, atrocious, or cruel' statutory aggravating circumstances." *Id.* at 949-50 n.7. Thus, like *Dawson*, *Barclay* permitted consideration of racial motive only because the motive was relevant to a neutral factor normally considered in the course of sentencing.

IV. COMPARISON WITH CIVIL RIGHTS LAWS CONFIRMS THAT THE WISCONSIN STATUTE IS UNCONSTITUTIONAL

The State and several *amici* suggest that striking down the Wisconsin hate crime statute would jeopardize a host of federal civil rights laws. As we show below, this is baseless: unlike the Wisconsin statute, the federal civil rights laws are clearly content-neutral. Although concerns about status-bias might have been a factor in some legislators' minds, and although some federal civil rights laws might in some cases have incidental effects on individual beliefs, this does not trigger strict scrutiny. The First Amendment dictates heightened scrutiny when an enactment is directed by the legislature at the *content* of particular ideas or beliefs.[33] That is plainly not the case with the federal civil rights laws.

The fundamental differences between the Wisconsin statute and the civil rights laws are exemplified by Title VII. Title VII addresses discrimination by an employer on the basis of race, sex or certain other characteristics in regard to "employment practice[s]."[34] Thus, within a single, carefully defined field—employment—Title VII targets the *effects* of discrimination.[35] This legislative purpose is carried out in significant part through the medium of disparate impact cases, which do not even

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[33] *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *accord United States v. O'Brien*, 391 U.S. 367, 382-86 (1968).

[34] 42 U.S.C. § 2000e-2 (1988). Employment discrimination laws regarding persons with disabilities, 42 U.S.C. § 12112, are content-neutral and narrowly tailored for the same reasons as Title VII.

[35] Thus, Title VII's purpose is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

inquire into the motivations of the employer; they focus entirely on objective indicia of unequal treatment, without regard to subjective mental state.[36]

Even in disparate treatment cases under Title VII, employment discrimination—unlike violent crime—stems from a wide variety of motivations and beliefs, of which status-based antagonism is only one. For example, Title VII affects employers who have commercial concerns about pleasing customers; paternalistically believe women should be protected instead of being exposed to "men's jobs;" affirmatively prefer to help fellow members of their own community—be it racial, religious, national or geographic—instead of others of different groups; passively accept traditional stereotypes that certain groups are frail, unintelligent, weak or lazy; or are overly affectionate (sexual harassment). Title VII falls on each of these various beliefs only in a haphazard and partial manner, and would have been a peculiarly ill-designed way for Congress to have sought to suppress any of those beliefs.

Other aspects of Title VII's structure also differentiate it from the Wisconsin Statute and belie any effort to punish particular beliefs. Among other things, Title VII typically applies not to individuals (who actually hold beliefs), but to corporations and businesses (that do not). 42 U.S.C. § 2000e(b) (1988) (limiting application to employers of at least 15 persons). And Title VII's relief is primarily compensatory—making victims whole—instead of punishing

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[36] 42 U.S.C. § 2000e-2(k)(l) (1988); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs*, 401 U.S. at 430-32; Barbara L. Schlei & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 5 (2d ed. 1983) (calling *Grigg*'s establishment of the disparate impact doctrine "the most important decision in employment discrimination law."); Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 951-52 (1982) (explaining why the disparate impact doctrine has had such a large impact on employment discrimination law).

the perpetrator. 42 U.S.C. § 2000e-5 (1988). Title VII simply is not a plausible means by which Congress would have sought to punish unpopular individual beliefs.

So it is with the overwhelming majority of other federal discrimination statutes. Whether they are targeted at employment, places of public accommodation, housing or the exercise of certain individual rights, these statutes are content-neutral. Like Title VII, these laws are narrowly focused on vindicating essential rights in specific areas, not on broadly punishing beliefs.[37] Also like Title VII, these statutes generally do not require proof of subjective motivation,[38] and, even when such motivation is relevant, the statute is triggered by a wide range of beliefs about the protected status.[39] Moreover, many of these

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[37] *See* 42 U.S.C. § 2000a(a) (1988) (public accommodation); 42 U.S.C. § 12182 (1990) (public accommodation "on the basis of disability"); 42 U.S.C. § 12112 (1990) (employment disability); 42 U.S.C. § 1981 (1988) (civil rights); 42 U.S.C. § 1982 (1988) (real and personal property); 42 U.S.C. § 3604 (1988) (housing).

[38] For example, 18 U.S.C. § 241, which outlaws conspiracies "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," was aimed at the content-neutral objective of preserving individual rights; it specifically does *not* require proof of some proscribed belief or animus. *See United States v. Guest*, 383 U.S. 745, 760 (1966) ("whether or not motivated by racial discrimination"); *United States v. Kozminski*, 487 U.S. 931, 941 (1988); *see also* 18 U.S.C. § 242 (1988); 42 U.S.C. § 1983 (1988).

[39] Persons with disabilities may face discrimination in employment under 42 U.S.C. § 12112 or in the enjoyment of places of public accommodation under 42 U.S.C. § 12182 because of factors such as paternalism, concerns about customers, and fiscal concerns. Persons may face discrimination in housing under 42 U.S.C. § 3604 or 42 U.S.C. § 1982 because of factors such as concern about property values, a desire for quiet (discrimination against families with children), fiscal concerns in providing access to the disabled, and beliefs by realtors that persons of certain race "prefer" certain neighborhoods.

laws have particular exceptions or elements that are inconsistent with an intention of punishing particular beliefs.[40] In short, as with Title VII, these laws were plainly not intended as—and manifestly cannot serve as—punishment for proscribed beliefs.[41]

Two federal civil rights laws appear, albeit only superficially, to be less dramatically different from the Wisconsin statute. First, 42 U.S.C. § 1985(3) creates a private cause of action against persons who conspire to deprive any person or class of persons of the equal protection of the laws. As enacted by Congress, the section focused on the content-neutral objective of guaranteeing all persons equal rights under law. In the words of Representative Shellabarger, who sponsored the legislation, "[t]he object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens." Cong. Globe, 42d Cong., 1st Sess. 478 (1871). Unlike the Wisconsin statute, nothing in the

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[40] For example, the laws regarding places of public accommodation also do not extend to "a private club or other establishment not in fact open to the public, . . .," *id.*, at § 2000a(e), nor to any lodging establishment which "contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence," *id.*, at § 2000a(b)(1). Moreover, whereas the Wisconsin statute indiscriminately punishes motivations based on the same statuses across the board, the federal civil rights laws apply for a particular status only in areas where the effects of discrimination based on that status have been especially destructive. *See* 42 U.S.C. § 3604 (1988) (only housing laws include "familial status"); 42 U.S.C. § 2000a(a) (1988) (does not include gender).

[41] Several other federal civil rights statutes include "state action" requirements. *See* 42 U.S.C. § 1983 (1988); 18 U.S.C. § 242 (1988). The constitutionality of limitations on state officials, acting under color of state law, presents an entirely different set of First Amendment issues, which are in no way implicated by the criminal punishment of a purely private citizen for a purely private crime. *See Rankin v. McPherson*, 483 U.S. 378 (1987).

text of § 1985(3) called for any showing of status-based animus.

Moreover, the structure of § 1985(3), as with the other civil rights laws, reflects its focus on preserving "equal rights under law" rather than on status-based hatred. Section 1985(3) only calls for inquiries into class-based animus where private conspirators *also* had an "intent to deprive persons of a right guaranteed against private impairment."[42] This Court's decisions in *Bray* and *Carpenters* emphasize that there are "few such rights," and those that have been recognized are primarily directed at the Thirteenth Amendment.[43] And, perhaps most importantly, this category of cases at which section 1985(3) was directed were those where, in the post-Civil War South, the legal systems of the States had proven wholly unable to provide justice.[44] This narrowly-tailored response, in a carefully defined set of cases, to a problem that could not otherwise be addressed, simply cannot be regarded as an effort to seek out and punish individual beliefs.[45]

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[42] *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 762 (1993); *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983).

[43] *Bray*, 113 S. Ct. at 764.

[44] *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 321 (1871) (statement of Cong. Stoughton) ("The State authorities and local courts are unable or unwilling to check the evil or punish the criminal"); *id.* at 155-58 (statement of Sen. Sherman) (detailing repeated failures of state authorities to protect individual rights).

[45] Various amici observe that, in *Griffin v. Breckenridge*, this Court implied into § 1985(3) an additional requirement that the plaintiff prove race or other class-based animus. *See Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Carpenters*, 463 U.S. at 833; *Bray*, 113 S. Ct. at 759. That new requirement is nowhere suggested, even indirectly, in § 1985(3)'s language and it is at best only tenuously linked to the provision's legislative history. Rather, the *sole* reason for the Court's

The same is true of 18 U.S.C. § 245. Section 245 imposes criminal penalties on any person who "by force or threat of force wilfully injures, intimidates, or interferes with" any other person "because of his race, color, religion or national origin and because he is" attending public school, receiving public benefits, seeking employment, or engaging in certain other protected acts.[46] Unlike the Wisconsin "hate crime" statute, § 245 does not reflect a legislative effort to target certain beliefs because they are abhorrent. Such an effort would not be made through the ill-suited vehicle of a statute that requires proving: (a) the use of force or threat of force, (b) that wilfully injures or intimidates, (c) a person *both* because of his race *and* his enjoyment of certain defined public benefits. Section 245 is relatively carefully-crafted to address a narrow and specific set of problems; it does not simply attach punishment to bigotry wherever it can be found.[47]

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construction in *Griffin* was its concern that such a requirement was essential to avoid the "constitutional shoals" that the statute faced when extended to private persons. *Griffin*, 403 U.S. at 102; *Bray*, 113 S. Ct. at 759. This history does not even remotely suggest that Congress enacted § 1985(3) with the "purpose" of targeting unpopular beliefs because of their content. *Ward*, 491 U.S. at 791. Rather, it was this Court that adopted the animus element for constitutional reasons wholly unrelated to any notion of punishing individual beliefs.

[46] The same analysis applies to 42 U.S.C. § 3631(a) (1988) (making it unlawful to wilfully injure, intimidate or interfere with a person in regard to specific housing-related actions because of their race, color, religion, sex, handicap, familial status, or national origin), which was enacted in the same statute as § 245.

[47] *See* 114 Cong. Rec. 9559 (1968) (under section 245, "[e]ach area of protected activity is specifically described.") (statement of Congressman Celler, Chairman of the House Judiciary Comm.). Indeed, the bill that was to become section 245 was revised to require that the interference under section 245 be "because" the person is engaged in the protected activity instead of the prior language of "while he is lawfully" engaged in the protected activity. Otherwise:

Moreover, the reason Congress chose to address the problems was demonstrably *not* to punish beliefs, but was instead to deal with an issue that the existing criminal justice system in the States could not redress. As the legislative history of Section 245 recounts:

> Racial violence almost invariably involves a violation of State law . . . . In some places, however, local officials either have been unable or unwilling to solve and prosecute crimes of racial violence or to obtain convictions in such cases—even where the facts seem to warrant. As a result, there is need for Federal action to compensate for the lack of effective protection and prosecution on the local level.

S. Rep. No. 721, *reprinted in* 1968 U.S.C.C.A.N. at 1839-40. In contrast, the Wisconsin statute is directed entirely at certain biases, wherever they occur in the criminal field (without regard to causal linkage), even though the existing, content-neutral criminal justice system provides a superior means of punishing wrongdoers.

* * *

In dissent, Justice Bablitch asked, "How can the Constitution not protect discrimination in the selection of a victim for discriminatory firing . . . and at the same time protect discrimination in the selection of a victim for criminal activity?" *Mitchell*, 485 N.W.2d at 820. The answer is plain: the Constitution does not protect employers who discriminate from actions under content-

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> The statute may have swept too broadly . . . in light of the wide scope of some of the categories of protected activities. For example, the bill could have been read as making criminal any racial assault against someone while he is employed, or [engaged in other protected activity].

S. Rep. No. 721, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1837, 1844.

neutral civil rights laws any more than it protects defendants from prosecution and sentencing under content-neutral criminal laws. Todd Mitchell *can and should* be punished because his offense was brutal, remorseless, unprovoked and terrifying. What the First Amendment does not permit is what the Wisconsin statute does—namely, to punish a defendant *because of* the content of his beliefs.

CONCLUSION

For these reasons, the judgment of the Wisconsin Supreme Court below should be affirmed.

Respectfully submitted,

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APPENDIX A

Transcript of Testimony in *State v. Wyant*, No. 89-CR-92 (Ct. Common Pleas, Delaware Cty. Ohio 1989) at pg. 251.

Q: And you lived next door to [Mrs. Ware, a 65-year old black neighbor of Wyant's] for nine years and you don't even know her first name?

A: No.

Q: Never had dinner with her?

A: No.

Q: Never gone out and had a beer with her?

A: No.

Q: Never went to a movie?

A: No.

Q: Never invited her to a picnic at your house?

A: No.

Q: Never invited her to Alum Creek?

A: No, she never invited me nowhere, no.

Q: You don't associate with her, do you?

A: I talk with her when I can, whenever I see her out.

Q: All these black people that you have described that are your friends, I want you to give me one person, just one who was a really good friend of yours.

A: Kenny Redman.

APPENDIX B

Selected Wisconsin Statutes Applicable Under the Wisconsin "Hate Crimes" Statute

Wis. Stat. § 944.06 (incest)

Wis. Stat. § 945.02 (gambling)

Wis. Stat. § 946.06 (flag desecration)

Wis. Stat. § 946.10 (bribery of public officers and employees)

Wis. Stat. § 941.01 (negligent operation of vehicle)

Wis. Stat. § 941.03 (obstructing highways)

Wis. Stat. § 941.23 (carrying a concealed weapon)

Wis. Stat. § 941.034 (using fluoroscopic or X-ray machine for the purpose of shoe-fitting)

Wis. Stat. § 941.36 (fraudulently tapping electric wires or gas or water meters or pipes)

Wis. Stat. § 943.27 (knowingly possessing records of usurious loans)

Wis. Stat. § 943.38 (forgery)

Wis. Stat. § 946.31 (perjury)

Wis. Stat. § 946.46 (encouraging probation or parole violations)

Wis. Stat. § 946.61 (bribing witnesses)

Wis. Stat. § 946.68 (simulating legal process)

Wis. Stat. § 948.04 (leading animal from motor vehicle)

Wis. Stat. § 948.10 (sale of baby rabbits, chicks and other fowl)